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Nos. 03-1500; 03-1693

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN
Petitioner,
v.
RICK PERRY, *et al.*
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MCCREARY COUNTY, KENTUCKY, *et al.*
Petitioners,
v.
AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, *et al.*
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of *Amici Curiae*
American Humanist Association, Association of Humanistic Rabbis, American Ethical Union, Atheist Alliance International, Covenant of Unitarian Universalist Pagans, Equal Partners in Faith, Humanist Society, The Humanist Institute, HUUmanists, Institute for Humanist Studies, International Humanist and Ethical Union, Internet Infidels, National Center for Science Education, Secular Coalition for America, Skeptics Society, Society for Humanistic Judaism, Unitarian Universalist Association
In Support of Petitioner, Thomas Van Orden /Respondents, American Civil Liberties Union of Kentucky, et al.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES v

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. The Lemon Test, As A "Fail One, Fail All" Three-Prong Test, Is A Sensible Reflection Of The Values Embodied In The Establishment Clause, And Remains An Eminently Workable And Dynamic Model To Assess The Constitutionality Of Government Activity 8

II. In *Van Orden* and *McCreary* The Predominant Purpose For Posting The Ten Commandments Was Religious, Thus Violating The Establishment Clause. 10

A. The Court Must Examine The Content, Context, And History Of The Ten Commandments Displays In Order To Distinguish Sham Secular Purposes From Sincere Ones 11

B. The Content, Context, And History Of The Monument In *Van Orden* Clearly Shows That The Government's Purported Purpose Was A Sham And That

The Primary Purpose Was Religious 12

C. The Content, Context, And History Of The Displays In *McCreary* Clearly Show That The Government's Purported Purpose Was A Sham And That The Primary Purpose Was Religious 13

D. Respondents Have Failed To Exert Even A Mild Effort To Educate Citizens About The Ten Commandments As The "Foundation of American Law And Government," Or The "Moral Background Of The Declaration Of Independence And The Foundation Of Our Legal Tradition," Showing These Purported Secular Purposes To Be A Sham 14

E. The Purported "Historical" Purposes At Issue Are Difficult Or Impossible To Effectuate And Should Not Be Given Approval By This Court..... 16

III. The Posting Of The Ten Commandments On Public Property In *McCreary* and *Van Orden* Constitutes Government Endorsement Of Religion Because The Effect Of The Government Action Advances Religion, And An

Objective Observer Would Believe That The Government Has Endorsed Religion 19

A. A Reasonable Viewer Would Perceive The Display Of The Ten Commandments As A State Advancement And Endorsement Of Religion Favoring The Jewish And Christian Faiths And Their Display Therefore Has The Primary Effect Of Advancing Religion. 19

B. Surrounding The Ten Commandment Displays With Secular Objects Does Not Neutralize The Religious Impact Of The Ten Commandments, But It Does Convey The Message That Christian And Jewish Religious Messages Have A Community Value Equal To Civic And Patriotic Messages, And That The Government Endorses Those Religious Messages..... 20

C. The Fact That The Ten Commandments Were Privately Funded Does Not Render Them Secular Or Neutralize The Government Advancement Of Religion..... 23

D. Posting The Ten Commandments On Public

Grounds Constitutes Government Endorsement Of Certain Religious Sects To The Exclusion Of Religious Minorities And Nontheists 23

E. Public Posting Of Any One Version Of The Ten Commandments Endorses Certain Religious Sects To The Exclusion Of Other Religions That Rely On Materially Different Versions Of The Ten Commandments 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

ACLU of Ky. v. McCreary County, Ky., 354 F.3d 438 (6th Cir. 2003) 13, 14, 15, 16, 17, 23

ACLU of Ky. v. Pulaski County, Ky., 96 F. Supp. 2d 691 (E.D. Ky. 2000).....25

Adland v. Russ, 107 F. Supp. 2d 782 (E.D. Ky. 2000) 22

Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000) 11, 20, 21, 22

Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 20

Comm. For Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) 10

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) 10

County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989) 8, 10, 12, 20, 24, 25

Edwards v. Aguillard, 482 U.S. 578 (1987) 10, 12, 14

Gonzales v. North Tp. of Lake County, Ind., 4 F.3d 1412 (7th Cir. 1993).....11

Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 2001).....11

Harvey v. Cobb County, 811 F. Supp. 669 (N.D. Ga. 1993).....26

Lamb's Chapel v. Ctr. Moriches Sch. Dist., 508 U.S. 384 (1993).....10

Larkin v. Grendel's Den, 459 U.S. 116 (1982).....12

Lee v. Weisman, 505 U.S. 577 (1992).....10, 23

Lemon v. Kurtzman, 403 U.S. 602 (1971).....8, 19

Lynch v. Donnelly, 465 U.S. 668 (1984).....10, 24

McCreary County I, 96 F.Supp.2d 667 (E.D. Ky. 2000).....13

McGowan v. Maryland, 366 U.S. 420 (1961).....18

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).....10, 11

School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203 (1963).....12, 14

Stone v. Graham, 449 U.S. 39 (1980)10, 12, 14, 15, 23, 24, 26

Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003).....11, 12, 13, 21, 22

Wallace v. Jaffree, 472 U.S. 38 (1985).....10, 11, 14, 20

Zelman v. Simmons-Harris, 536 U.S. 639 (2002).....10

OTHER AUTHORITIES

Owen Weatherly, *The Ten Commandments in Modern Perspective* (1961).....26

Steven K. Green, "The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law," 14 J.L. & Religion 525 (1999-2000).....17

Steven Lubet, *The Ten Commandments in Alabama*, 15 Const. Comment. 471 (1998).....7

The Ten Commandments in the Quran, www.submission.org/quran/ten.html (last visited Dec. 2, 2004).....25

INTEREST OF AMICI CURIAE[1]

The American Humanist Association is the oldest and largest humanist organization in the nation, dedicated to ensuring a voice for those with a positive, nontheistic outlook. Humanism is a progressive philosophy of life that, without supernaturalism, affirms the ability and responsibility of human beings to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The mission of the AHA is to promote the spread of humanism, raise public awareness and acceptance of humanism, and encourage the continued refinement of the humanist philosophy.

The American Humanist Association provides a unique viewpoint concerning the endorsement involved in the public posting of the Ten Commandments as well as the history of religious freedom in the United States because it represents a unique worldview that is without theism, holy scriptures, or absolute "commandments."

The Association of Humanistic Rabbis is the national professional organization of ordained rabbis serving congregations and other organizations within the humanistic Jewish movement.

The American Ethical Union is the federation of Ethical societies in the United States which together constitute the religious fellowship sometimes referred to as the "Ethical Culture Movement." The Ethical Culture movement is more than 128 years old with thousands of

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[1] The AHA files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici curiae*, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

members nationwide. Internationally, the American Ethical Union is a founding member of the International Humanist and Ethical Union and is recognized by the United Nations as a non-governmental organization.

Atheist Alliance International is an organization of independent religion-free groups and individuals in the United States and around the world. Its primary goals are to help democratic, atheistic societies become established and work in coalition with like-minded groups to advance rational thinking through educational processes. Through the Alliance, members share information and cooperate in activities with a national or international scope.

The Covenant of Unitarian Universalist Pagans is an independent affiliate of the Unitarian Universalist Association created to meet the needs of Pagan-identified Unitarian Universalists. CUUPS is dedicated to educating people about Paganism, promoting interfaith dialogue, developing Pagan liturgies and instructional materials, and fostering healing relationships with mother the Earth and all her children.

Equal Partners in Faith is a multi-racial national network of religious leaders and people of faith committed to equality and diversity. Its diverse faith traditions and shared religious values lead its members to affirm and defend the equality of all people, regardless of religion, race, ability, gender, sexual orientation or gender identity. As people of faith, its members actively oppose the manipulation of religion to promote inequality and exclusion.

The Humanist Society is a nonprofit, religious organization offering humanism as a personal, family, and community lifestyle. It certifies individuals in communities throughout the United States to provide ceremonial

observances of the significant occasions of life. Founded by former Quakers in 1939, the Humanist Society trains and ordains its own ministry, who upon ordination are then accorded the same rights and privileges granted by law to the priests, ministers, and rabbis of traditional theistic religions.

The Humanist Institute educates leaders, spokespersons, and advocates to benefit all elements of the Humanist movement in a three-year postgraduate certificate program. It also serves as a think tank to explore Humanism and its values in its present form and future evolution.

The HUUmanists are an independent affiliate of the Unitarian Universalist Association. Within this context HUUmanists practice, promote, enhance, and enjoy Humanism; provide a continental organization for humanists; and defend and protect humanism and freedom of thought. HUUmanists achieve these goals by arranging programs, forums, and lectures; publishing humanist writing to give voice to humanist values; encouraging the establishment of local humanist groups, and maintaining a humanist presence on the Internet. Founded in 1962 the HUUmanists' primary publications are the semi-annual journal *Religious Humanism* and the quarterly newsletter *HUUmanists News*.

The Institute for Humanist Studies is a think tank based in Albany, New York, whose mission is to promote greater public awareness, understanding, and support for humanism. The Institute specializes in pioneering new technology for the advancement of humanism and also engages in grassroots and legislative advocacy in order to further the rights and interests of the non-religious. Founded in 1999, IHS provides accessible and authoritative information about humanism to academia, the media, and the general public, while providing financial grants to other non-

religious groups in its effort to bring the humanist movement into a more cooperative relationship.

The International Humanist and Ethical Union is the world federation of humanist organizations. It is the sole world umbrella organization embracing humanist, atheist, rationalist, secularist, skeptic, laique, ethical cultural, freethought, and similar organizations worldwide. The IHEU has specialist consultative status at the United Nations in New York, Geneva and Vienna; general consultative status with the Council of Europe; and maintains operational relations with United Nations Educational, Scientific, and Cultural Organization in Paris.

The Internet Infidels run the *Secular Web* (www.infidels.org), the largest and most viewed website relating to atheism, humanism, freethought, and a scholarly critique of religion.

The National Center for Science Education is a nonprofit membership organization that supports the teaching of evolution in the public schools and opposes the presentation of religious views (such as creationism) in the science classroom.

The Secular Coalition for America's mission is to increase the visibility and respectability of nontheistic viewpoints within the United States and to protect and strengthen secular government as the best guarantee of freedom for all. Its members are national atheist, freethought, humanist, and secular organizations committed to cooperative action in areas of mutual interest and concern. The Coalition promotes liberties of conscience for the approximately thirty million American citizens who hold nontheistic worldviews.

The Skeptics Society is a nonprofit organization specializing in science education and research through a monthly science lecture series at the California Institute of Technology, the publication of *Skeptic* magazine, the publication of *Jr. Skeptic* magazine for students, the publication of the *Baloney Detection Kit* for teachers, the publication of the *Baloney Detection Books* for students, research on belief systems and the influence of culture and politics on science and science education, and the promotion of science and critical thinking.

The Society for Humanistic Judaism is the central body of the national humanistic Jewish movement. The Society's mission is to mobilize people to celebrate Jewish identity and culture consistent with a humanistic philosophy of life. The Society assists in organizing and supporting congregations and in providing a voice for its members.

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States and North America. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom.

Amici file this brief with the consent of all parties. The letters granting consent are enclosed herewith.

SUMMARY OF ARGUMENT

The *Lemon* test is a sensible reflection of the values embodied in the Establishment Clause and remains an eminently workable and dynamic model to assess the constitutionality of government activity. Just as the

Establishment Clause itself embodies multiple values, so must the tests that this Court employs to decide acceptable Constitutional parameters. Because of our unique national history, it is now widely accepted that our government cannot legislate in a manner that endorses one religion over others, or religion generally. It is equally clear that our system of government is not designed to undertake actions, the principal purpose or effect of which is to advance religion, and that our government must not allow itself to become excessively entangled with religion or religious matters. As difficult as it may be to navigate the challenges presented when our collective civic and religious values conflict, it is imperative that we respect the constitutional values that give meaning to the Establishment Clause. Those values are adequately represented in the three-pronged *Lemon* test as it has evolved and been refined through this Court's decisions.

The Ten Commandment displays at issue in *McCreary* and *Van Orden* violate the Establishment Clause by failing to satisfy one or both of the religious purpose and effects tests set forth in *Lemon*. The "plainly religious" nature of the Ten Commandments justifiably elevates courts' skepticism of proffered legislative purposes for posting them, and this Court is also correct to examine the context, content, and history of Ten Commandment displays in order to decipher true legislative purposes. The nature of the analysis required under the Establishment Clause mandates this comprehensive examination, and early indications of religious or secular purposes clearly and importantly assist the courts in determining whether particular legislative actions are wholly, partly or predominantly secular or religious.

The purported purposes for the displays at issue in *McCreary*, while perhaps appearing secular in their final

version, are nevertheless predominantly religious. In *McCreary* this is exacerbated by the clear religious purpose of the original and second display efforts, and by the superficial and misguided attempt to characterize the historical contributions of the Ten Commandments to our nation's legal system. In *Van Orden* the purported purpose cannot be characterized as "bona fide, legitimate, and not a mere sham" because of the plainly religious nature of the Ten Commandments monument and the absence of a logical connection between the monument's display and the purported purpose.

The displays at issue in *McCreary* and *Van Orden* violate the "effects" prong of the *Lemon* test. When employing the "objective observer" standard, it is clear that the primary effect of the displays is to advance religion, specifically Christianity and Judiasm. It is also clear that surrounding the Ten Commandments with secular objects communicates government endorsement of religion, especially when, as is the case here, there is no effort to explain the historical, legal or cultural relevance of the Ten Commandments to the secular objects. The display of any version[2] of the Decalogue on public property under the circumstances presented in these cases has the clearly discernable effect of communicating government endorsement of religion (specifically monotheism). These displays also violate the "coercion" test that this Court employs in Establishment cases.

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[2] There are at least five distinctive versions of the Decalogue. This is important because the "deep theological disputes" that account for the different versions trigger further Establishment Clause infractions when one version is chosen to the exclusion of the others. *See* Steven Lubet, *The Ten Commandments in Alabama*, 15 Const. Comment. 471, 478 (1998) (concluding that "it takes naïveté ... to believe that a single rendition of the Ten Commandments could be considered universal and nonsectarian).

ARGUMENT

Under *Lemon v. Kurtzman* And Our Establishment Clause Jurisprudence, This Court Should Affirm The Sixth Circuit's Decision In *ACLU of Ky. v. McCreary County, Ky.* And Should Reverse The Fifth Circuit's Decision In *Van Orden v. Perry* Because None Of The Ten Commandment Displays At Issue Advance From A Legitimate, Bona Fide, Secular Purpose, And All Of Them Have The Effect Of Endorsing Religion.

I. The Lemon Test, As A "Fail One, Fail All" Three-Prong Test, Is A Sensible Reflection Of The Values Embodied In The Establishment Clause, And Remains An Eminently Workable And Dynamic Model To Assess The Constitutionality Of Government Activity.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const., amend. I. At the heart of the Establishment Clause is the idea that, at a minimum, a state or federal government cannot establish or endorse religious belief or activity or engage in activity the principal effect of which is to endorse or advance religion. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989). "The Establishment Clause, at the very least, prohibits governments from appearing to take a position on questions of religious beliefs or from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.*

In the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court established a three-prong test to assess whether government activity is impermissible under the

Establishment Clause. Under the *Lemon* test, as originally formulated, reviewing courts are required to consider whether: (1) the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters an excessive entanglement with religion. *Lemon*, at 612-13. This Court has used the *Lemon* test since the test's inception as a framework and guide for analysis on the constitutionality of government activity. This continued use of *Lemon* reinforces the underlying values of the Establishment Clause: that the government should not be acting with religious motivations, that its actions should not have the effect of advancing religion, and that it should not meddle or become entangled in religious affairs.

Although not perfect, the structure and approach of the *Lemon* test is a "common sense" methodology and remains the best tool for sorting through the inherently conflicting values in Establishment Clause cases. In any Establishment Clause case, a reviewing court is required to undertake the difficult task of determining where the line should be drawn between permissible First Amendment speech and/or activities covered by the Free Exercise Clause and impermissible government endorsement of religious activity under the Establishment Clause. The Establishment Clause provides very little guidance as to how this line should be drawn, but it does inspire the three necessary parameters to make this determination: (1) purpose, (2) effect, and (3) entanglement.

The *Lemon* test provides the best way for a court to go about making this decision, and it has been effective precisely because it forces a reviewing court to assess the constitutionality of legislative motivations and the results of their legislation, while continually respecting the maxim that the government should not involve itself in religious affairs.

In endeavoring to adhere to the mandates of the Establishment Clause, it was both necessary and helpful for the Court to create the three different methods of review set forth in *Lemon*.

For thirty-three years this Court has continued to use the *Lemon* test as the paramount guiding framework to determine whether the government's conduct is constitutional under the Establishment Clause.[3] The refining of the *Lemon* test over the years is proof that it is an eminently workable model to both assess the constitutionality of government conduct and foster an organic dialogue about the underlying social, religious, and constitutional values at play in Establishment Clause cases. Indeed, the adoption of the reasonable observer[4] standard in the endorsement/effects analysis illustrates the constantly evolving nature of our Establishment Clause jurisprudence and the flexible nature of the *Lemon* doctrine.

II. In *Van Orden* and *McCreary* The Predominant Purpose For Posting The Ten Commandments Was Religious, Thus Violating The Establishment Clause.

[3] *See, e.g. Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Allegheny*, 492 U.S. 573; *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Stone v. Graham*, 449 U.S. 39 (1980); *Comm. For Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

[4] *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *Aguillard*, 482 U.S. 578; *Allegheny*, 492 U.S. 573.

A. The Court Must Examine The Content, Context, And History Of The Ten Commandments Displays In Order To Distinguish Sham Secular Purposes From Sincere Ones.

The Court's analysis of Appellants' actual purpose for posting the Decalogue must examine the content, context, and evolution of the displays at issue. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (stating that courts must examine the circumstances surrounding the governmental enactment and the conduct of the [appellants] throughout the dispute to determine primary purpose). This is because it is the "duty of the courts to 'distinguish a sham secular purpose from a sincere one.'" *Id.* (quoting *Wallace*, 472 U.S. at 75 at 75).

This comprehensive analysis must include an examination of the legislature's "original purpose" for erecting religious displays because it is the only way to effectively perform the purpose analysis under *Lemon*. *See Books v. City of Elkhart*, 235 F.3d 292, 295, 303-304 (7th Cir. 2000); *Gonzales v. North Tp. of Lake County, Ind.*, 4 F.3d 1412, 1420-21 (7th Cir. 1993); *Harris v. City of Zion*, 927 F.2d 1401, 1413-14 (7th Cir. 2001). The evolution of the actual display is helpful in distinguishing sham secular purposes from actual ones. This is important because, as the situation in *McCreary* demonstrates, it is not difficult to concoct a secular purpose in order to oppose removal of a religious display. This capacious examination is also necessary in situations like in *Van Orden*, where the purpose for erecting a specifically religious monument must be evaluated in the context of the conduct and activity occurring *after* a proposed secular purpose is offered. *See Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003).

B. The Content, Context, And History Of The Monument In *Van Orden* Clearly Shows That The Government's Purported Purpose Was A Sham And That The Primary Purpose Was Religious.

Because the purpose prong "is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes," *Aguillard*, 482 U.S. at 592-94, it is reasonable that the "plainly religious" nature of the Ten Commandments would render their posting on public property facially suspect. Indeed, the specifically Christian and Jewish precepts, "I AM the LORD thy God," "Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven images, and "Thou shalt not take the Name of the Lord thy God in vain," tend toward the reasonable inference that the displaying government has a primarily religious (specifically monotheistic) purpose for displaying and maintaining the monument. *See id.* at 585 ("This intention may be evidenced by promotion of religion in general ... or by advancement of a particular religious belief.") (citing *Stone*, 449 U.S. 39).

Although the purported purpose in *Van Orden* was to "recognize and commend a private organization for its efforts to reduce juvenile delinquency," *Van Orden*, 351 F.3d at 178, the State cannot employ a religious means to serve otherwise secular interests. *See Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 265 (1963) (Brennan, J., concurring). Whenever a government entity can achieve a secular end through either secular or religious methods, and it chooses the religious method to accomplish its goals, its motivations are suspect. *See Allegheny*, 492 U.S. at 618 (Blackmun, J., concurring). Furthermore, in 1993, several years after the purported secular purpose was offered, the monument was

re-positioned "on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court building ... *to reflect the role of the Commandments in the making of law*." *Van Orden*, 351 F.3d at 181 (emphasis added). This is analytically identical to the purposes rejected by the 6th Circuit in *McCreary* and the Supreme Court in *Stone*. Furthermore, in this situation it is simply illogical to grant that efforts to honor a private organization could or should justify the posting and maintaining of a religious monument in a manner that, as will be addressed below, constitutes a clear endorsement of religion.

C. The Content, Context, And History Of The Displays In *McCreary* Clearly Show That The Government's Purported Purpose Was A Sham And That The Primary Purpose Was Religious.

In *McCreary*, the first display only contained the Ten Commandments, the second display supplemented the first with textual excerpts celebrating religion, and the third display simply surrounded the Ten Commandments with new secular and patriotic items. *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 440-444 (6th Cir. 2003) ("*McCreary County II*"). At the beginning of this process the Kentucky officials (specifically Mr. Greene) professed his religious reasons for erecting the displays before conceding that the purpose was to "demonstrate America's Christian heritage," *McCreary County I*, 96 F.Supp.2d 667, 674 (E.D. Ky. 2000). The purported purpose was again amended "to demonstrate that the Ten Commandments were part of the foundation of American law and government ... [and] [to include the Ten Commandments] as part of the display for their significance in providing 'the moral background of the

Declaration of Independence and the foundation of our legal tradition.'" *McCreary County II*, 354 F.3d at 446-47.

Given the changing nature of the displays and purported purposes, it is clear that the only consistent motivation for the appellants was an effort to display the Ten Commandments on public property. Simply put, the main secular purpose that was proffered during the most recent stages of litigation was not present when the first and second displays were erected. It is difficult to find a better example of a "sham" purpose, and this Court should not give effect to Appellant's ad hoc efforts to cloak its predominantly religious motivations. *See Stone*, 449 U.S. 1104 (rejecting a conceptually identical sham purpose).

Just as the religious nature of the Ten Commandments has not changed since this court's decision in *Stone*, neither have the religious motivations of the Kentucky authorities. In *McCreary*, as in *Stone*, the "pre-eminent purpose" for posting the Ten Commandments was "plainly religious." *Stone*, 449 U.S. 39, 41 (1980). Where a "government intention to promote religion is clear," *Aguillard*, 482 U.S. at 585, this Court has consistently found the government action to violate the Establishment Clause despite government assertions of sincere nonreligious purposes. *See Stone*, 449 U.S. 39; *Aguillard*, 482 U.S. 578; *Wallace*, 472 U.S. 38; *Schempp*, 374 U.S. 203. The "sham" nature of Appellants proffered purpose is further illustrated by their utter "fail[ure] to integrate the Ten Commandments with a secular subject matter." *McCreary County II*, 354 F.3d at 453-54.

D. Respondents Have Failed To Exert Even A Mild Effort To Educate Citizens About The Ten Commandments As The "Foundation of American Law And Government," Or The "Moral Background Of The Declaration Of Independence And The Foundation Of Our Legal Tradition," Showing These Purported Secular Purposes To Be A Sham.

The most recent set of purposes advanced by Appellants in *McCreary* to justify the display of the Ten Commandments are sham purposes, partly because the current displays cannot reasonably effectuate their own purported purposes and partly because it does not appear that they were even designed to do so. These purposes are "to demonstrate that the Ten Commandments are part of the foundation of American Law and Government … [and] their significance in providing the 'moral background of the Declaration of Independence and the foundation of our legal tradition;'" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." *McCreary County II*, 354 F.3d at 446.

In light of the lack of evidence supporting the historical assertions of Appellant's proffered purposes and the absence of a comprehensive explanation that is required for the display to qualify as "an appropriate study of history, civilization, ethics, comparative religion, or the like" under *Stone*, 449 U.S. at 42, it is remarkable that the Appellants can actually suggest that their Ten Commandment displays were erected for remotely non-religious reasons. It would be extraordinarily difficult to accomplish these goals through even the most extensive exhibit of the Ten Commandments, let alone the displays erected by Appellants.

The displays in both the schools and the courthouses utterly fail to demonstrate even Appellants' own alleged connection between the Ten Commandments and American

law and government. Regarding the school installations, the prefatory text contains no factual information whatsoever. Instead it provides a brief resuscitation of the School Board's opinion that the documents in the displays "have had particular historical significance in the development of this country." *McCreary County II*, 354 F.3d at 450. Perhaps the only thing that is more vague and unsupported than this proffered opinion is the purpose it allegedly supports.

The text accompanying the courthouse display is equally conclusory. As support for the claim that the Ten Commandments "profoundly influenced . . . the formation of our country," it offers as "clear" evidence the Declaration of Independence's reference to a "Creator," *Id.* at 451, even though the term "Creator" is nowhere in the courthouse version of the Ten Commandments, *see id.* at 443, n. 2. The text then concludes with the overbroad and unsupported contention that "[t]he Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." *Id.* at 446-47. This bald assertion was also devoid of any historical proof, substantiated commentary or plausible support. It is difficult to imagine a legitimate, bona fide purpose being so far off the mark from its proponent's efforts to effectuate it, but not as difficult as it would be (assuming they wanted to) for them to actually accomplish it.

E. The Purported "Historical" Purposes At Issue Are Difficult Or Impossible To Effectuate And Should Not Be Given Approval By This Court.

Appellants would have to sacrifice objectivity and intellectual honesty in order to demonstrate that the Ten Commandments are the moral background of the Declaration of Independence and the foundation of our law and

government. The most fundamental expressions of our system of government – the Declaration of Independence, the Constitution, and the Bill of Rights – have explicitly rejected the religious ideology propounded in the Ten Commandments. Appellants' stated purposes are a sham because they are simply untenable assertions the sole purpose of which is to provide secular cover for the State to advance a particular religious viewpoint.

The claim that the Declaration of Independence was created against the "moral background" of the Ten Commandments is simply untrue. Thomas Jefferson, the Declaration's author, rejected claims of the purported influence of Christianity on the common law.[5] In addition, the references in the Declaration to "Creator" and "God" did not refer to the God who gave Moses the Ten Commandments, but rather the "watchmaker" God of eighteenth century deism.[6] The same man who penned the immortal, self-evident truth that all men are created equal, surely did not believe in the God of the courthouse Commandments, who warns, "[F]or I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me." *McCreary County II*, 354 F.3d 443, n. 2.

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[5] Steven K. Green, "The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law," 14 J.L. & Religion 525, 547 (1999-2000) (quoting January 24, 1814, letter from Jefferson to Adams stating that, through "judicial forgery, the Bible, Testament, and all [Church doctrine was] ingulphed into the common law without citing any authority," in Lester J. Cappon, ed., *The Adams-Jefferson Letters* 421-25 (UNC Press, 1959)).

[6] *McCreary County II*, 354 F.3d at 452-53 (citing Allen Jayne, *Jefferson's Declaration of Independence: Origins, Philosophy and Theology* 24 (1998)). It is worth noting that Jefferson's rough draft, in which the capitalization was rather more standard than in the final version, refers to a lowercase "nature's god" and contains no reference to a "Creator."

The Constitution and the Bill of Rights reject the encroachment of religious influence even more strongly than the Declaration of Independence does. Neither mentions God at all, let alone refers to the Ten Commandments. Indeed, the first four commandments plainly contradict the First Amendment. Prohibitions against idolatry and worshipping other gods would violate the Free Exercise Clause, penalties for blasphemy would violate the Free Speech Clause and a mandate to keep the Sabbath holy would violate the Establishment Clause. The remaining six commandments are also not mentioned.[7] In fact, the only other discussion of religion is in Art. VI, which states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The Constitution's own text, therefore, defeats the bold historical assertions that Appellants advance in their purported purposes.

In addition to our nation's "foundational legal" documents, state legal systems, dating from the present back to colonial days, have been overwhelmingly secular. While Puritan New England did experiment with codes based on the Decalogue, by the early 1700s the colonies abandoned this approach for the English common law, which was not based on the Bible. Green, *supra* note 5, at 542-43. Professor Green's extensive historical inquiry led him to conclude that "[t]he historical record fails to support claims of a direct relationship between the law and the Ten Commandments." *Id.* at 558.

The texts of the most basic American documents and the history of American legal theory refute Appellants'

[7] The "Sundays excepted" clause in Art. I, Sec. 7, ¶ 2 has been grounds for debate, but this Court has previously explored the development of these laws, finding that their secular emphasis was predominant as early as the mid-1770s. *McGowan v. Maryland*, 366 U.S. 420, 433-37 (1961).

claims that the Ten Commandments provided the "moral background" for the Declaration of Independence and the foundation of our legal system. At best, the Ten Commandments influenced the founding fathers in their private lives, which they kept separate from their public offices Isolated, unsuccessful episodes of experimentation with biblical law do not show that the Ten Commandments had any direct or lasting influence on American legal traditions. Furthermore, Appellants offer no evidence that the Ten Commandments directly influenced the Declaration of Independence, as they allege in their purported purposes for displaying them. This Court should conclude that these are sham purposes, manufactured to camouflage purely or predominantly religious purposes because Appellants' have neither made an effort to achieve the purposes as stated nor shown how they could ever possibly do so.

III. The Posting Of The Ten Commandments On Public Property In *McCreary* and *Van Orden* Constitutes Government Endorsement Of Religion Because The Effect Of The Government Action Advances Religion, And An Objective Observer Would Believe That The Government Has Endorsed Religion.

A. A Reasonable Viewer Would Perceive The Display Of The Ten Commandments As A State Advancement And Endorsement Of Religion Favoring The Jewish And Christian Faiths And Their Display Therefore Has The Primary Effect Of Advancing Religion.

The "effects" prong of the *Lemon* test asks whether the government activity's "principal or primary effect" advances or inhibits religion. *Lemon*, 403 U.S. at 612-13.

This has been refined such that the courts ask whether an "objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement of [religion]." *Wallace*, 472 U.S. 38 (O'Connor, J., concurring); *Allegheny*, 492 U.S. at 593 (showing the majority of the Court's implicit adoption of the endorsement test). In short, the endorsement test looks to whether the government has conveyed a message that religion is favored, preferred, or promoted over other beliefs.

In *Pinette*, this Court recognized that "an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., concurring). Any reasonable observer would view monuments on the grounds of the state capital and displays on the courthouse grounds as public property, or at least endorsed by the government owner of the property. The objects' religious character is equally apparent, especially in the context of *Van Orden*. *See Books*, 235 F.3d at 302 ("Th[e] religious format is enhanced, not detracted from, by the etchings at the bottom of the tablet of the Stars of David and the Chi Rho symbol, a distinctive Christian symbol."). It would be unreasonable to believe that the religious items were on the monument without government permission.

B. Surrounding The Ten Commandment Displays With Secular Objects Does Not Neutralize The Religious Impact Of The Ten Commandments, But It Does Convey The Message That Christian And Jewish Religious Messages Have A Community Value Equal To Civic And Patriotic Messages, And That The Government Endorses Those Religious Messages.

In *Books*, a 7th Circuit case dealing with a display that was identical to the one at issue in *Van Orden*, the court rightly rejected the notion that surrounding the Decalogue with secular symbols renders it secular. *See Books*, 235 F.3d 292. Indeed, "the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion ... and civil government." *Id.* at 307. The reasoning of the 7th Circuit was endorsed by this Court in its denial of certiorari. *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001) (Stevens, J., statement respecting denial of cert.) (stating that "the reasons why this case is not one that merits certiorari are explained in detail in Judge Ripple's thoughtful opinion for the Court of Appeals.") The displays at issue in *McCreary* and *Van Orden* are similar in that they also are both surrounded with secular symbols.[8] Because of this, it is all the more important to appreciate the likelihood that the reasonable observer will interpret the displays as a State endorsement of religion.

In *Van Orden*, this likelihood is accelerated by the nature of the display as a "monument." Monuments are generally understood to refer to memorials, records, testaments, tributes, reminders, etc., and they are generally erected on public property to honor heroes, soldiers, leaders,

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[8] This similarity is explicitly apparent in the *McCreary* case, where the Decalogue is only one of several items in the display, and expressly relevant in *Van Orden*, because of the secular engravings on the actual monument and the secular items displayed in the vicinity of the monument. *See Van Orden*, 351 F.3d at 180-81 (relying upon the Decalogue's placement on the grounds of a National Historic Landmark among other secular monuments and memorials to show that a reasonable observer would not view the display as an endorsement of religion).

great events, etc. Given the nature of monuments, it is clear that there is a stark difference between artwork being placed in a publicly funded art museum[9] and a copy of the Ten Commandments being placed on the grounds of the state capital or the county courthouse, or in a schoolroom. In *Van Orden* the Ten Commandments monument was placed "on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court building … to reflect the role of the Commandments in the making of law." *Van Orden*, 351 F.3d at 181. This placement would further support the reasonable person's conclusion that Texas endorses Judeo-Christian values, just as it would support the conclusion that the placement of any monument in such a prominent location indicates that the State "approved of the display and the full panoply of its religious content." *See Adland v. Russ*, 107 F. Supp. 2d 782, 786 (E.D. Ky. 2000) (finding that an identical monument placed on the capital grounds in Kentucky constituted government endorsement).

Like the monuments in *Books* and *Adland*, the one in *Van Orden* also clearly mingles religious and secular symbols without providing any sort of explanation for the apparent links "between religion … and civil government." *See Books*, 235 F.3d at 307. Because they "utterly fail[ed] to integrate the Ten Commandments with a secular subject matter," the government actors in *McCreary* not only failed to demonstrate a bona fide secular purpose but they also

[9] The District Court in *Van Orden* relied heavily on the facts that the Texas Capital Grounds are designated as a "National Historic Landmark" and the curator of the Capital is a "professional museum curator," in an attempt to analogize the grounds as a museum-type setting as described in *Allegheny*, or the Ten Commandments as a religious painting. Obviously, it is much more likely that a reasonable viewer would perceive government endorsement in the case of a religious monument featured prominently on capital grounds than they would while viewing a work of art in an art museum.

ensured that their Ten Commandments displays would cause a reasonable person to believe that they were witnessing a government endorsement of religion. *See McCreary County II*, 354 F.3d at 453-54.

C. The Fact That The Ten Commandments Were Privately Funded Does Not Render Them Secular Or Neutralize The Government Advancement Of Religion.

The fact that the Ten Commandments Monument in *Van Orden* was not purchased with taxpayer revenue is of no consequence when it comes to the Establishment Clause. *Stone*, 449 U.S. at 42 (holding that the "mere posting of the copies under the auspices of the legislature provides the "official support of the State … Government that the Establishment Clause prohibits." This makes sense, especially because the State of Texas took no steps to keep from endorsing the monument or to try to neutralize its plainly religious effect.

D. Posting The Ten Commandments On Public Grounds Constitutes Government Endorsement Of Certain Religious Sects To The Exclusion Of Religious Minorities And Nontheists.

The first line on the displays, "I AM the Lord Thy God," illustrates both the monotheistic and the sectarian character of the displays. By explicitly asserting the existence of a God, the Decalogue itself endorses theistic sects over nontheistic sects, such as Buddhism, as well as over the beliefs of agnostic and atheistic nontheists. This Court has acknowledged, and should continue to appreciate, the prominent existence of nontheists within the American religious landscape. *See e.g. Lee*, 505 U.S. at 617 (1992)

(Souter, J., concurring). Also, by using the singular "I AM," the Decalogue endorses monotheistic religious sects over polytheistic sects, such as Hinduism. Similarly, by referring to a masculine God over a feminine Goddess, the Decalogue represents a unique conception of the ultimate nature of the Deity that is not shared by all. The posting of the Ten Commandment displays in *McCreary* and *Van Orden* therefore impinge upon the respect for religious pluralism that "is commanded by the Constitution," *Allegheny*, 492 U.S. at 610, and could not be more antithetical to the values embodied in the Establishment Clause. As this Court stated in *Lynch*, "[e]ndorsement sends a message to non-adherents that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community." 465 U.S. at 688.

E. Public Posting Of Any One Version Of The Ten Commandments Endorses Certain Religious Sects To The Exclusion Of Other Religions That Rely On Materially Different Versions Of The Ten Commandments.

Over twenty years ago this Court stated that the Ten Commandments are "undeniably a sacred text in the Jewish and Christian faiths and no recitation of a supposed secular purpose can blind [the Court] to that fact." *Stone*, 449 U.S. at 41. This is significant because it acknowledges that the Ten Commandments (and monuments or displays like those at issue in these cases) exist as an object of faith for some people but not for others. However, it is also important not to overlook the discriminatory impact that this form of government endorsement has on "believers." As the lower court in *McCreary* observed, the posting of one version of the Ten Commandments to the exclusion of others causes the

"display to run further afoul of the Establishment Clause because it infringes upon the 'sectarian differences among various Christian denominations [that] were central to the origins of our Republic." *ACLU of Ky. v. Pulaski County, Ky.*, 96 F. Supp. 2d 691, 701, n. 9 (E.D. Ky. 2000) (quoting *Allegheny*, 492 U.S. at 589).

Because "[t]he simultaneous endorsement of Judiasm and Christianity is no less constitutionally infirm than the endorsement of Christianity alone," this Court has "expressly required strict scrutiny of practices suggesting a denominational preference," *Allegheny*, 492 U.S. at 608-09, 614-15 (citing *Larson v. Valente*, 456 U.S. at 246). Both the nature of the Ten Commandments and the actual displays at issue in these cases indicate a denominational preference.[10] For example, in *Van Orden*, the monument on display presents the Protestant (with portions of the Jewish) version over the Catholic version. Additionally, to the extent that any of the Ten Commandments are embodied in the Quran, they are also not accurately represented in the version chosen on the Texas monument. *See The Ten Commandments in the Quran*, www.submission.org/quran/ten.html (last visited Dec. 2, 2004).

In *Stone* this Court rejected efforts to post the Decalogue on classroom walls partly because the first

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[10] The Ten Commandments, as commonly cited, appear twice in the Old Testament: in Exodus 20:1-17 and Deuteronomy 5:1-21. These two versions don't match perfectly. Furthermore, the versions of the "Ten Commandments" as they tend to appear on monuments don't include everything from these verses but tend to be abbreviated, condensed, or paraphrased with parts left out. The decision on which parts to include and which to leave out is necessarily a sectarian (even denominational) religious one; not all Christians, Jews, and Muslims would necessarily agree on the details of such abbreviations, condensations, or paraphrases.

"table" of the Ten Commandments solely concerns the religious duties of monotheistic believers. *Stone*, 449 U.S. at 41-43. However, it is important to acknowledge that even the "uncontroversial" phrases in the Decalogue, such as "Thou Shalt Not Kill," express an unconstitutional denominational preference. As the court in *Harvey v. Cobb County* aptly noted, "[t]hat is not what the text says in the original Hebrew, which says 'Thou shalt not murder.'" 811 F. Supp. 669, 672 (N.D. Ga. 1993), *affd*, 15 F.3d 1097 (11th Cir. 1994), *cert. denied*, 511 U.S. 1129 (1994). This has important theological implications because, by illustration, "Thou shalt not kill" is violated by capital punishment and war. *See e.g.* Owen Weatherly, *The Ten Commandments in Modern Perspective* (1961) at 92, 97.

In this situation, the decision to post one version of the Decalogue over others conveys the message from the State that the Protestant version is "correct" and the Muslim, Jewish, and Catholic versions are "incorrect." It is surely situations like these that were envisioned by the drafters of the First Amendment. And it is exactly for this reason that the government should avoid giving its imprimatur to *any* version of the Ten Commandments. Abrogation of this constitutional limitation could force the courts to have to decide between competing versions of the Ten Commandments, which would most certainly trigger entanglement problems under *Lemon*.

CONCLUSION

The decision of the Sixth Circuit in *McCreary* should be affirmed and the decision of the Fifth Circuit in *Van Orden*

should be reversed because the Ten Commandment displays at issue violate the Establishment Clause.

Respectfully submitted,

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